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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 596

CLINTON E. JENCKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming the judgment of conviction (Pet. App. 69-96) [1] is reported at 226 F. 2d 540. The opinion of the court of appeals affirming the order of the district court denying petitioner's motion for a new trial (Pet. App. 49-67) is reported at 226 F. 2d 553.

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[1] "R" refers to the printed transcript of the record at the trial on the merits; "H" refers to the printed transcript of the record at the hearing on the motion for a new trial; "Pet." refers to the petition for certiorari; "Pet. App." refers to the appendix to the petition; "G. Ex." refers to Government exhibits.

JURISDICTION

The judgments of the court of appeals were entered on October 26, 1955. Petitions for rehearing were duly filed, and were denied on December 1, 1955. The petition for a writ of certiorari was filed on December 28, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court erred in denying petitioner's several motions for the production of various F.B.I. reports where it had not been shown that the reports were contradictory to the testimony of a Government witness and that the contradiction was as to relevant, important, and material matters which directly bore on the issue being tried.

2. Whether the trial court erred in charging the jury on the issues of membership and affiliation, and as to the competence of certain witnesses who had been paid for their services in furnishing information to the F.B.I.

3. Whether the trial court erred in admitting into evidence a non-Communist affidavit signed and filed by petitioner in October, 1949.

4. Whether petitioner was denied any procedural right under the federal statute governing the selection of juries or under the Constitution by the exclusion of women from the jury pursuant to Texas law.

STATUTES INVOLVED

Pertinent provisions of 18 U.S.C. 1001, 28 U.S.C. 1861, 29 U.S.C. 159(h), and Vernon's Texas Civil

Statutes, Article 2133, are set forth in Appendix A, pages 36-37, *infra*.

STATEMENT

Petitioner was convicted on two counts of having violated the false-statement statute, 18 U.S.C. 1001. Each count charged that petitioner made false statements to the National Labor Relations Board in an Affidavit of Non-Communist Union Officer (National Labor Relations Board Form 1081) which he executed on April 28, 1950, and filed with the Board on May 1, 1950. Count One charged that petitioner falsely stated in the affidavit that he was not then a member of the Communist Party (R. 2), and Count Two charged that he falsely stated that he was not then affiliated with the Communist Party (R. 2). The affidavit (G. Ex. 1, R. 978) was executed and filed by petitioner, pursuant to the requirements of 29 U.S.C. 159(h), on behalf of Local 890, International Union of Mine, Mill, and Smelter Workers, hereinafter referred to as the Mine-Mill Union.

Subsequent to April 28, 1950, petitioner signed and filed with the National Labor Relations Board a complaint on behalf of his union, against one of the employers having a contract with his union (R. 1000), which complaint was duly processed by the Board (R. 97-99). The complaint was executed by petitioner and could not have been processed, had he not filed his non-Communist affidavit of April 28, 1950 (R. 98-100).

Petitioner was editor of his union newspaper (R.

965). In October, 1949, petitioner published in the paper a statement, over the names of himself, as president, and the other local union officers, headed, "What the Next C.I.O. Convention Means to Our Union." The statement reported that President Murray had threatened to expel petitioners' union from the C.I.O., and that the union had suffered greatly from raids by other unions. The statement further said (R. 968):

> Now that our Union has signed the phony affidavits we can defend ourselves on a ballot in case of raids. We do not fear attack from that quarter any longer.

On October 15, 1949, petitioner had executed a non-Communist affidavit as required by the National Labor Relations Act, as amended (G. Ex. 7, R. 989). Prior to October, 1949, the policy of petitioner's union had been not to file the non-Communist affidavits required by the Act (R. 510, 572).

Petitioner's connection with the Communist Party was developed through the testimony of eight witnesses, six of whom had formerly been members of the party. Their testimony may be summarized as follows:

Edward Currie, a former member of the Communist Party (R. 195-198), testified that in April, 1946, petitioner attended a Communist Party meeting held at the home of Arthur Bary, Chairman of the Communist Party of Colorado (R. 209-210). At this meeting petitioner urged Communist

Party members to participate more extensively in the activities of veterans' organizations (R. 209-217).

George Knott, a former member of the Communist Party (R. 410), identified petitioner as a Communist Party member (R. 413) in 1946, when petitioner was hired by the Mine-Mill Union as a business agent for their local unions in the Silver City-Bayard, New Mexico, area (R. 410-412). Petitioner also discussed with Knott, Orville Larson, elected Board member of the union, and Morris Graham, the Communist Party Organizer for the Arizona and New Mexico area, plans for the organization of a strong Communist Party group in each of the local unions in the Silver City area (R. 416-418.[2] Petitioner was instructed that party dues would be payable at the Phoenix office (R. 418).

James E. Peterson, a former member of the State Central Committee of the Communist Party of Utah (R. 490-491), testified that in late 1947 or early 1948 he attended a closed Communist meeting with the petitioner at the Hotel Utah in Salt Lake City in connection with a mining, smelting, and refining conference of the Mine-Mill Union (R. 739-740).

Peterson also met petitioner at the Rocky Mountain Convention of the Communist Party held in Denver, Colorado, in the winter of 1947-1948 (R. 500-501). At this meeting petitioner was appointed

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[2] Clay M. Brooks testified that in the spring of 1947, when he was a neighbor of petitioner (R. 385, 387), petitioner had stated that he was a Communist and proud of it (R. 388).

a member of a committee to promote the interests of the Mexican-Americans in order to bring them into the Communist Party and the labor movement (R. 505-507).

Peterson further testified that sometime during the month of May or June, 1948, petitioner attended another meeting of Communist Party members in Denver, Colorado (R. 507-508). This meeting was called to discuss strategy relative to the secession of opposition elements from the union (R. 509). The Labor Management Relations Act was also discussed and the members were instructed that it was the policy of the Communist Party at that time not to sign the non-Communist affidavits (R. 510).

Kenneth Eckert testified that he was a member of the Communist Party from 1931 to 1948 (R. 899, 902, 903). From 1946 to 1948 Eckert was a member of the Communist Party Steering Committee in the Mine-Mill Union (R. 903). Eckert first met petitioner at a meeting of the Steering Committee held in Chicago in August, 1947 (R. 905-906).[3] At this meeting petitioner urged that Chesley Smotherman be elected vice-president of the Union inasmuch as he could be depended upon to carry out the instructions of the Communist Party (R. 909-910). Eckert again met petitioner later that month at Communist Party meetings in St. Paul (R. 911-

[3] Gilbert Green, State Secretary of the Communist Party of Illinois, and Fred Finn, Trade Union Secretary of the Communist Party of Illinois, were also present at this meeting (R. 907).

912) where petitioner again urged that Smotherman be elected as vice president (R. 913-914).[4]

J. W. Ford was a member of the Communist Party in New Mexico from 1948 until September 1950 (R. 250-275). He testified that he saw petitioner at Albuquerque, New Mexico, in August 1948 at the home of Joseph DiSanti (R. 257), then chairman of the Communist Party in Albuquerque (R. 257). At this meeting petitioner outlined to the group his plans as a candidate for Congress on the Progressive Party ticket (R. 259).

Ford next met petitioner in February, 1949, at a meeting in Santa Fe, New Mexico (R. 259). At this meeting petitioner and his wife were among the delegates chosen to attend a meeting of the Mexican-American Association to be held in Phoenix, Arizona (R. 260). All delegates chosen were Communist Party members (R. 260). In connection with the Mexican-American Association, petitioner also attended a Communist Party meeting at a ranch near Santa Fe, New Mexico (R. 269-271). This meeting was called by DiSanti to prepare for a meeting of the Association to be held in Albuquerque, New Mexico (R. 269). DiSanti instructed those in attendance to give their support to the

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[4] Eckert testified that the Communist Party had different types of membership, including "membership at large" which was reserved for Communist Party members who occupied strategic positions in labor unions and other organizations where public knowledge of their Communist Party membership would jeopardize their positions in the organization (R. 914-915). Eckert also pointed out that the Communist Party did not keep minutes of its meetings (R. 916).

forthcoming meeting, but not to be conspicuous (R. 270). Subsequently, in mid-August, 1949, petitioner attended the Albuquerque meeting, during the course of which a resolution calling for the Association publicly to disavow Communism was defeated (R. 271-272). Petitioner's wife led the opposition to the resolution (R. 272-274).

Ford testified that in early 1949 the Communist Party in New Mexico was divided into two main groups: the Northern section headed by Joseph DiSanti and the Southern section headed by petitioner (R. 263). At a Communist Party meeting held in Hot Springs, New Mexico, in April 1949, petitioner was assigned to carry out the Communist Party's interest in labor (R. 265).[5] In accepting this task, petitioner pledged strong support to the state organization of the Communist Party and stated that he would concentrate mainly on recruiting Communist Party members from the labor forces in his area and that he would particularly see that greater financial support be given the Communist Party (R. 266).

In May, 1949, Ford again met petitioner at a Communist Party meeting held in Joseph DiSanti's home in Albuquerque, New Mexico (R. 267). At this meeting, petitioner stated that he was having success in recruiting Communist Party members among the labor forces. He also advised that he would report regularly to the Chairman of the State Board of the Communist Party on monies collected

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[5] At this meeting DiSanti was selected as organizer of the Communist Party in the State of New Mexico (R. 265).

and that his union newspaper would be open to support issues of concern to the Communist Party. (R. 268).[6]

In addition to being a member of the State Board of the Communist Party (R. 265-266, 268), Ford was also one of the security officers for the Communist Party in the State of New Mexico (R. 276). He testified that no disciplinary action was ever taken by the Communist Party against petitioner in his presence, during the period from 1949 through September, 1950 (R. 277-282), and also that so far as he knew as of September, 1950, petitioner had not been replaced as a member of the State Board of the Communist Party of New Mexico (R. 300).[7]

Harvey Matusow, a member of the Communist Party from 1947 until 1951 (R. 585, 599), testified with respect to several conversations he had had with petitioner at a ranch near Taos, New Mexico, in July and August, 1950 (R. 589-598). They discussed such matters as the Stockholm Peace appeal (R. 590-591), the inauguration of a "do-day" by the New York City Communists (R. 591), and petitioner's activities among the Mexican Communists who, petitioner said, were attempting to slow down

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[6] Petitioner concluded by stating that he intended to shift some of the responsibility in his area to Arthur Flores (R. 268-269). Arthur Flores was the Notary Public who notarized the Affidavits of Non-Communist Union Officer executed by Jencks (R. 149 *et seq.*).

[7] Ford testified that during 1949 and 1950, he, like most other Party members, did not carry a Communist Party card (R. 299-300).

production of basic metals, essential to the Korean war effort (R. 591).

Jesus Terrazas, a former member and shop steward in petitioner's union (R. 929), testified that issues of the "National Guardian" and "Daily People's World" were kept in the union hall of Local 890 (R. 930), that on many occasions in 1950, 1951, and 1952 petitioner, who was president of Local 890 (R. 929), encouraged the union members to read the "Daily People's World." Petitioner urged that it was the only newspaper that brought the truth to the people, as the other newspapers were controlled by capitalists (R. 930-932). Several witnesses identified the "Daily People's World" as the Communist Party newspaper on the West Coast (R. 418, 596, 924). Petitioner told Terrazas in 1950 that he had signed the non-Communist affidavit (R. 573). Terrazas was later expelled from the Mine-Mill union because he fought against Communism (R. 962-963).

Additional facts relevant to the procedural rulings and the portions of the trial court's charge contested by petitioner are, in the interest of brevity and clarity, set forth in course of the Argument, *infra*.

Petitioner adduced no evidence in rebuttal, other than documents showing his war record and documents establishing his place of residence in New Mexico during the period June to December, 1947 (R. 1027-1048).

The jury returned a verdict of guilty on both

counts on January 21, 1954 (R. 1126), and petitioner appealed from the conviction.

On January 28, 1955, while the appeal was pending, a motion for a new trial on grounds of newly discovered evidence was filed in the District Court for the Western District of Texas. At the hearing on the motion, Harvey Matusow testified for petitioner and recanted certain of the testimony he had given at the trial. The Government produced ten witnesses and eighteen exhibits in rebuttal.[8] After due consideration of all the evidence, the court denied the motion on March 12, 1955 (H. 825-826).[9]

On October 26, 1955, the court of appeals unanimously affirmed the conviction of petitioner on both counts of the indictment (Pet. App. 69-96), and similarly affirmed the judgment of the district court denying petitioner's motion for a new trial (Pet. App. 49-68).

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[8] A summary of the evidence adduced at the hearing on the motion is contained in Appendix B, *infra*. See also the opinion of the court below, Pet. App. 54-63. Petitioner has not challenged in this court the substantiality of the evidence supporting the judgment of the trial court denying his motion for a new trial.

[9] After the ruling on petitioner's motion, the trial court cited Matusow for contempt for obstructing justice (H. 819-820). Following a hearing held four days later, Matusow was adjudged guilty of contempt and sentenced to three years' imprisonment. On appeal, the conviction was reversed on the ground that the requirements of Rule 42, F. R. Crim. P., had not been met. *Matusow* v. *United States*, decided January 27, 1956 (C. A. 5). The same panel of the Fifth Circuit decided the *Matusow* case as had decided both of the *Jencks* appeals.

SUMMARY OF ARGUMENT

The Court has previously upheld the constitutionality of the non-Communist affidavit provision of the National Labor Relations Act, as amended, and denied certiorari in a case involving various collateral issues as to the scope and meaning of that provision. *American Communications Association* v. *Douds*, 339 U. S. 382; *Osman* v. *Douds*, 339 U. S. 846; *Hupman* v. *United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U. S. 953. Petitioner's attack in this case is confined to the validity of various evidentiary rulings of the trial court and to the adequacy of the charge. Petitioner also attacks the validity of the exclusion of women from the jury pursuant to the requirements of Texas law.

1. The trial court did not abuse its discretion in refusing petitioner's several motions for the production of various F. B. I. reports. When these motions are analyzed in the context of the trial setting in which they were made and denied, it becomes apparent that petitioner had not, in any instance, developed a sufficient foundation for the motion by showing that the reports were contradictory of the testimony of a Government witness and that the contradiction was as to relevant, important, and material matters which directly bore on the main issue being tried. *Gordon* v. *United States*, 344 U. S. 414, 419. Cf *Goldman* v. *United States*, 316 U. S. 129, 132.

2. The trial court adequately instructed the jury on the issues of membership and affiliation. The fact that the instructions do not require that peti-

tioner's act of joining the Party be proved is immaterial, since the fact of membership may be proved by conduct which is consistent only with membership. Particularly is this true, as here, where the evidence established that it was the policy of the Communist Party to conceal the membership of persons holding strategic positions in labor unions.

Petitioner's contention that the jury could have based its finding of membership on pre-affidavit evidence alone is not persuasive in view of petitioner's failure, in the face of evidence tending to show continued membership, to adduce any evidence that he had resigned from the Party or otherwise terminated his membership therein. Moreover, the court in its charge made it plain that the affidavit for the filing of which petitioner was being tried was the one dated April 28, 1950.

Petitioner's contention that the charge as to affiliation was erroneous in that it did not foreclose conviction on the basis of proof of affiliation with the Party for lawful purposes mistakes the purpose of the statute. Unlike the statute involved in *Bridges* v. *Wixon*, 326 U. S. 135, it is affiliation on the part of a union officer with the Communist Party as such to which the Labor Act has reference. Under the Labor Act, union officers may not be "affiliated" with the Communist Party for any purpose. In any event, since membership and affiliation were charged in separate counts, and, following conviction on both counts, like sentences were imposed on each count, to run concurrently,

affirmance of the conviction on either count would require that the judgment of the court below be affirmed. *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

There was similarly no error in the instructions to the jury with respect to the credibility of two informant witnesses. The jury was plainly instructed that the two witnesses had been paid for their information and that the jury might consider this circumstance in determining the weight to be accorded their testimony.

3. The trial court did not err in admitting into evidence a non-Communist affidavit signed and filed by petitioner in 1949, notwithstanding the fact that the document tended to show a violation of law not charged in the indictment. The 1949 affidavit, together with other evidence, showed an abandonment by petitioner's union of its former policy of non-compliance with the affidavit requirement of the Act, together with the reasons for that abandonment, and in conjunction with the 1950 affidavit tended to show a continuing scheme or plan on the part of petitioner to bring his union into compliance with the Act for the purpose of obtaining its benefits. The document was relevant and material to the issue being tried and hence admissible.

4. Petitioner was not deprived of any procedural right under the federal statute governing the selection of juries or under the Constitution by the exclusion of women from the jury pursuant to Texas law. The federal statute explicitly removes from the class of competent jurors any one who is in-

competent to serve under the law of the state in which the district court is held. At the time this case was tried, women were not competent to serve as jurors in Texas. Nor does application of the mandate of the federal statue infringe any constitutional rights of petitioner. There is no constitutional rule or policy which requires women to be placed on jury lists. In any event, so far as Texas is concerned, the issue is moot. Since the trial of this case, the laws of Texas have been amended so as to qualify women for service on juries.

ARGUMENT

In American Communications Association v. *Douds*, 339 U.S. 382, this Court upheld the constitutionality of Section 9(h) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947 (29 U.S.C. 159(h)). See also *Osman* v. *Douds*, 339 U.S. 846. The Court held that the non-Communist affidavit provision of that section was a valid exercise of Congressional power to protect commerce from the evils of disruptive, politically inspired strikes, and that its terms were not unconstitutionally vague. *In Hupman* v. *United States*, 219 F. 2d 243 (C.A. 6), this Court denied certiorari, 349 U.S. 953, in a case involving a conviction of making false statements in a non-Communist affidavit which presented various collateral issues as to the scope and meaning of Section 9(h). Petitioner in this case does not challenge the constitutionality of Section 9(h), but confines his attack to the validity of various eviden-

tiary rulings of the trial court and to the adequacy of the charge. Petitioner also attacks the validity of the exclusion of women from the jury pursuant to the requirements of Texas law.

1. *Production of F.B.I. documents*

Petitioner contends (Pet. 19-26) that the court below erred in affirming the trial court's denial of certain motions of petitioner to produce various documents from the files of the F.B.I.

It is, of course, well settled that a "large discretion must be allowed the trial judge" with respect to the production of documents, and that in the absence of abuse the exercise of that discretion will not be reviewed. *Goldman* v. *United States*, 316 U. S. 129, 132; *D'Aquino* v. *United States*, 192 F. 2d 338, 375 (C.A. 9), certiorari denied, 343 U.S. 935; *Little* v. *United States*, 93 F. 2d 401, 407 (C.A. 8), certiorari denied, 303 U.S. 644; *Arnstein* v. *United States*, 296 Fed. 946, 950 (C.A. D.C.), certiorari denied, 264 U.S. 595. Cf. *Glasser* v. *United States*, 315 U.S. 60; *Alford* v. *United States*, 282 U.S. 687. This is so, even where the document sought has been used at the trial to refresh a witness's recollection. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233, 234. Since the appropriate action on a motion to produce made in connection with the examination of a witness depends on the significance of the fact offered for proof, which in turn depends on "numerous and subtle considerations difficult to detect or appraise from a cold record * * *," the trial court's discre-

tion should be upheld absent "a clear showing of prejudicial abuse of discretion." Cf. *Michelson v. United States*, 335 U.S. 469, 480. There was no such abuse here.

Petitioner on four occasions, twice during the trial and twice in the course of the hearing on petitioner's motion for a new trial, moved for the production of certain documents. In each instance the motion was denied. When the rulings of the trial court are examined in the trial setting in which they were made, their correctness becomes apparent.

a. Petitioner opened his cross-examination of Matusow at the trial by developing the fact that Matusow had reported orally and in writing to the F.B.I. with respect to the conversations he had had with Matusow in July, 1950 (R. 656-658). Petitioner thereupon, without any attempt to develop a foundation for his request, asked that all such reports be produced from the files of the F.B.I. for inspection by the court, and that such portions as contradicted the witness's testimony be made available to petitioner (R. 658-659). After argument on the motion (R. 658-667), during which Government counsel pointed out that, so far as appeared, "this witness has not varied one particle from any of those other statements he has made and the statements he is making on the witness stand now" (R. 664), the court denied the motion.

This ruling was plainly correct. Under the circumstances, petitioner's motion contemplated a "blind fishing expedition" of the sort this Court condemned in *Gordon v. United States*, 344 U.S.

414, 419. There the Court held that production of certain signed statements by a witness should have been ordered at the trial, where (344 U.S. at 418-419):

> By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried * * *.[10]

Petitioner here had made no attempt to show that the prior statements of the witness were contradictory of his present testimony.[11] *Cf. Shelton* v.

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[10] In *Gordon*, the Court further held that the trial court erred in excluding from evidence a transcript of proceedings based on the same events in another court against the witness wherein the court had deferred sentencing the witness and advised him "to tell the probation authorities the whole story even though it might involve others." 344 U.S. at 417, 421, 422. The fact that this Court might well have affirmed the conviction had the record revealed only the error discussed in the text is suggested by its statement in conclusion that: "We believe * * * that the *combination* of these *two* errors was sufficiently prejudicial to require reversal" (*id.* at 422, emphasis added).

[11] Petitioner cites (Pet. 16, 20-21) several Second Circuit cases which reveal a practice on the part of certain of the judges in that Circuit of requiring the production, in appropriate instances, of pre-trial statements of a witness for inspection by the court, which statements may thereafter, if they appear to the court to be contradictory of statements made by the witness on the stand, be made available to the

United States, 205 F. 2d 806, 814-815 (C.A. 5). Accordingly, the teaching of this Court in *Goldman* v. *United States*, 316 U.S. 129, 132, controlled the disposition of the motion. There this Court said that:

> [It is] the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them.

As the court below held (Pet. App. 94), the trial court properly refused to order the production of the F.B.I. documents relating to Matusow's conversations with Jencks in July, 1950.

b. Some time later, petitioner made the same motion for the production of reports which the witness Ford, who had testified before Matusow, had made to the F.B.I. (R. 896-898). The motion plainly stood on the same ground as the motion relating to

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defendant. E.g., *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *United States* v. *Cohen*, 145 F. 2d 82, 92 (C. A. 2), certiorari denied, 323 U.S. 799. It is, of course, not error to follow this practice, but the question here is whether it is an abuse of discretion for a trial court to refuse to order the production of documents for inspection by the court where it has not been shown that they contain statements which contradict statements made by a witness from the stand. The Second Circuit cases were elaborately discussed in the briefs of the parties in this Court in *Gordon* v. *United States*, 344 U.S. 414. Nothing in this Court's decision in that case indicates a disposition on the part of this Court to limit the discretion which trial courts had historically exercised in this area. As we have shown in the text, the Court there carefully limited its ruling requiring the production of documents to instances where a proper foundation had been laid.

reports of Matusow, and was denied for the same reasons (R. 898).

c. At the hearing on the motion for a new trial, Matusow under cross-examinaiton by the Government said that in the latter part of August, 1953, prior to the trial of the case, he had told an F. B. I. agent that he did not wish to testify against petitioner and further remarked that he had said he did not feel that his testimony "was honest" (H. 68). Some time later, petitioner moved for an order requiring the Government to produce the reports of the F. B. I. relating to this conversation (H. 107). The motion was denied (H. 107). However, the Government called as a witness Clarence Crandall, the Resident Agent of the F. B. I. in Santa Fe at the time that Matusow had said that he made such a statement. Crandall testified that on August 27, 1953, Matusow had visited him at his offices. Matusow stated that he was reluctant to testify further in the Jencks case because the publicity he had received seemed to work against his marital relations. He said nothing to the effect that such testimony would not be "honest." Matusow visited Crandall briefly on one other occasion and talked with him twice over the telephone. At no time did he indicate that he had ever given dishonest testimony. (H. 752-756.) On cross-examination of Crandall, petitioner asked no questions relative to Matusow's statement that he had said his testimony in the Jenck's case was not honest (see H. 756-758), and did not after this testimony renew his motion for the production of the F. B. I.

reports relating to Matusow's statement to Crandall.

Here again, as the court below held (Pet. App. 63-66), petitioner had not developed a foundation for his request so as to bring it within the rule this Court laid down in *Gordon* v. *United States*, 344 U. S. 414,[12] and petitioner's interests were fully protected when the Government produced for examination the agent to whom Matusow had spoken at the times referred to. Obviously, as the court of appeals said (Pet. App. 66): "The [trial court] was not forced to accept Matusow's statement, but was justified in accepting the contradictory statement of the agent." Indeed, it appears that Matusow's reference to a pre-trial statement that his testimony in the Jenck's case was not "honest" was regarded by petitioner as unimportant in its trial setting. It was not noticed by petitioner's counsel at the time (H. 68, see H. 107), was not mentioned when the motion for the production of the F. B. I. reports was made (H. 107), and when Crandall was asked by Government counsel: "Did [Matusow] say to you he had been a dishonest witness * * *," petitioner's counsel objected on the ground that "Matusow did not testify that he had made any such statement to the F. B. I. man in Santa Fe" (H. 755-756).

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[12] The court of appeals pointed out, as a further distinction, that "Matusow's statement was not that of a witness against [petitioner] developed upon cross-examination, but was the statement of appellant's witness seeking to bolster testimony then being given" (Pet. App. 66, n. 13).

d. Toward the end of his testimony in support of petitioner's motion for a new trial, Matusow stated that, although he was a member of the Communist Party, he was not a member in the State of New Mexico, and that he had not attended any Communist functions there, and asserted that the reports he made to Agent Burttram of the F. B. I. in August, 1950, would bear this out (H. 660-661). He also asserted that in those reports he did not state that Jencks was a Communist nor did he say that Jencks had said he was a Communist (H. 661-662). Petitioner thereupon requested production of all the F. B. I. reports and records dealing with reports Matusow had given to Agent Burttram on the ground that they would corroborate Matusow's testimony (H. 663-664). The motion was denied (H. 664).

It is important to note that the denials made by Matusow, which his counsel sought to corroborate through the production of F. B. I. reports, did not traverse any statements Matusow had made in the course of the trial which resulted in petitioner's conviction. The record shows that Matusow's testimony at the trial concerned only certain conversations he had had with Jencks in 1950 (see Statement, *supra*, pp. 9-10). He did not testify that he, Matusow, was a member of the Communist Party of the State of New Mexico, nor did he state that petitioner was a member of the Communist Party or that petitioner had said that he was a member of the Party. Petitioner's effort to corroborate statements of the witness which did not directly

impeach testimony he had made at the trial was therefore strictly beside the point.[13] Moreover, it should be noted that the trial court ruled toward the end of the hearing after it had become apparent that Matusow's recantation was, as the court later held, bare fabrication (see the opinion of the court below, Pet. App. 55-61; Appendix B, *infra*, pp. 38-46), and that in any event, as the court below observed in affirming the judgment of the trial court denying petitioner's motion for a new trial (Pet. App. 63):

> There was ample evidence before the jury at the trial to warrant a conviction without the testimony of Matusow. We hold that, upon the whole record, it is manifest that the testimony without Matusow was so convincing that it is difficult to justify the thought that any other result could have been reached if Matusow had not been present as a witness.

Under the circumstances, the court below correctly held that the trial court did not abuse its dis-

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[13] Petitioner relies heavily on the fact that in *United States v. Flynn*, 130 F. Supp. 412 (S.D.N.Y.), Judge Dimock inspected certain F.B.I. documents reporting statements made by Matusow. This was, of course, within that court's discretion in the circumstances of that particular case, and does not show that the trial judge here abused his discretion in the different circumstances of this case. The fact that Judge Dimock concluded that Matusow's trial testimony could not be credited does not help petitioner, for that result also followed, as the court below made clear (Pet. App. 61-63), from the entirely different situation presented by that case.

cretion in denying petitioner's motion to produce Agent Burttram's reports.

2. *The charge.*

Petitioner objects to the adequacy of the trial court's charge on the issue of membership (Pet. 26-30), on the issue of affiliation (Pet. 34-36), and on the issue of the credibility of two witnesses who had been paid for their services in furnishing information to the F. B. I. (Pet. 40-43). In rejecting these contentions as "wholly unconvincing" and without merit, the court below noted (Pet. App. 88, 94-95) that in each of these respects the charge followed closely the charge given by the trial court and sustained on appeal in *Hupman* v. *United States*, 219 F. 2d 243 (C. A. 6), certiorari denied, 349 U. S. 953.[14]

a. Little need be said with respect to the adequacy of the charge on membership. Membership is a familiar concept and obviously was used in its familiar sense in the Act. As appears from the Statement (*supra*, pp. 4-10), the proof established that petitioner attended closed meetings of the Communist Party, reported on the activities of Communists in veterans' organizations, assisted in plans for the organization of Communist Party groups in union locals, served on a committee to promote interests of Mexican Americans with a view to bringing them into the Communist Party,

[14] See record in *Hupman* v. *United States*, No. 764, O.T. 1954, Appendix to appellant's brief in Court of Appeals, pp. 614a-618a.

etc. The proof also established that petitioner received instructions with respect to the payment of dues to the Communist Party, was accepted by other members of the Communist Party as a member, and on occasion asserted to non-Communists that he was a member of the Communist Party. In the light of such uncontroverted proof, the trial court properly instructed the jury that (R. 1061):

> In considering whether or not the defendant was a member of the Communist Party, you may consider circumstantial evidence, as well as direct. You may consider whether or not he attended Communist Party meetings, whether or not he held an office in the Communist Party, whether or not he engaged in other conduct consistent only with membership in the Communist Party and all other evidence, either direct or circumstantial, which bears or may bear upon the question of whether or not he was a member of the Communist Party on April 28, 1950.

Petitioner objects (Pet. 26-27) that the instructions do not require that petitioner's "act of joining" the Party be proved.[15] But membership is an

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[15] In support of his contention, petitioner quotes a statement of this Court that: "In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial." *American Communications Association* v. *Douds*, 339 U.S. 382, 410-411. But as reference to the context shows, the Court was not there addressing itself to the requirements of proof of membership, but was rather contrasting the problem of proving the objective fact of membership with the problem

objective fact and plainly may be proved, as here, by conduct which is consistent only with membership. Particularly is this true where, as here (see p. 7, fn. 4, *supra*), the evidence established that it was the policy of the Communist Party to conceal the membership of certain members, like petitioner, who occupied strategic positions in labor unions and other organizations where public knowledge of their Party membership would jeopardize their positions and hence their usefulness to the Party. See *Hupman* v. *United States*, 219 F. 2d at 248.

Petitioner's further objection that the jury could have based its finding of membership on pre-affidavit evidence alone (Pet. 29-31), and that petitioner might have resigned from the Party prior to filing his non-Communist affidavit, lacks persuasiveness, as the court below observed (Pet. 87-88), in view of petitioner's failure, in the face of evidence tending to show continued membership (Ford, R. 277-282, 300; Terrazas, R. 930-932, 961-963), to adduce any evidence of resignation and in view of the ease with which such proof could have been adduced by him if he had in fact resigned. Moreover, the argument ignores the fact that the court charged (R. 1058) that, in order to convict, the jury must find that the "defendant was a member of the Communist Party at the time stated in the instrument, that is, April 28, 1950."

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of proving the subjective state of mind of one who falsely swears that he does not believe in the overthrow of the Government by force.

b. Petitioner's contention (Pet. 36) that the charge as to affiliation (R. 1063) permitted the jury to return a verdict of conviction on the basis of pre-affidavit evidence alone parallels his similar argument with respect to the charge as to membership and must be rejected for the same reasons.

Petitioner's principal attack on the charge as to affiliation (Pet. 34-36) is that it did not foreclose conviction on the basis of proof of affiliation with the Party for such of its purposes as may have been wholly lawful. He relies on the decision of this Court in *Bridges* v. *Wixon*, 326 U.S. 135. There the Court held that proof of affiliation, as used in 8 U.S.C. 137, which provides for the deportation of aliens who are members of or affiliated with any organization that advocates the overthrow by force or violence of the Government of the United States, must show adherence to the unlawful activities of the Party, and that proof of cooperation with respect to activities not themselves unlawful was insufficient to invoke the provisions of the statute.

The *Bridges* case is clearly distinguishable. The statute involved there was operative only in the event of proof of affiliation with an organization advocating forcible overthrow of the Government. The form of the statute itself suggests Congressional concern with the unlawful purposes of such an organization. The instant case, by contrast, involves a statute in which Congress has lawfully provided that the services of the National Labor Relations Board shall not be available to unions whose officers fail to file an affidavit stating that "he is

not a member of the Communist Party or affiliated with such party * * * (*infra*, p. 36). It is affiliation on the part of the union officer with the Communist Party as such to which the statute has reference. As this Court held in *American Communication Association* v. *Douds*, 339 U.S. at 393, since "Congress might reasonably find * * * that Communists, unlike members of other political parties, * * * represent a continuing danger of disruptive political strikes when they hold positions of union leadership", Congress could constitutionally condition the availability of the services of the Labor Board upon the filing of the so-called non-Communist affidavits.

It may further be noted that it is not affiliation with the Communist Party which is made unlawful by the statute; nothing in the Labor Act makes such affiliation a crime. Petitioner has not been convicted of affiliating with the Party; he has rather been convicted of falsely swearing that he was not so affiliated. In the context of this statute, unlike the situation in *Bridges*, the question of affiliation with the Communist Party is separate and distinct from the nature of the objectives of the Party. For these reasons, the charge on the issue of affiliation accurately reflected the purpose and intent of the statute as upheld by this Court in *Douds*.

In any event, it should be noted that false swearing as to membership was charged in Count One, that false swearing as to affiliation was separately charged in Count Two, and that following conviction on both counts like sentences were imposed on each count to run concurrently (R. 1129). In these

circumstances, affirmance of the conviction on either count would require that the judgment of the court below be affirmed. *United States* v. *Sheridan*, 329 U.S. 379; *Hirabayashi* v. *United States*, 320 U.S. 81; *Brooks* v. *United States*, 267 U.S. 432.

c. Finally, petitioner contends that the court's instructions failed to provide a standard by which to judge the credibility of witnesses Ford and Matusow who were informants for the Government (Pet. 40-43).

As this Court has had occasion to note, there is no policy or rule of evidence which forecloses use by the Government of otherwise relevant evidence supplied by informants. *Caminetti* v. *United States*, 242 U.S. 470, 495-496; *United States* v. *Dennis*, 183 F. 2d 201, 224-225 (C.A.2), affirmed, 341 U.S. 494. The use of informants involves solely an issue of credibility which is peculiarly within the competence of the jury which hears the witnesses and observes their demeanor. Thus the trial court, in instructing the jury on this matter, correctly charged (R. 1064):

> The witnesses, Jerry W. Ford and Harvey M. Matusow, have testified that for a period of time they received money for services and expenses in furnishing information to the Federal Bureau of Investigation, and you may consider that circumstance when you pass upon the weight and credit which you give them as witnesses, but you are the sole judges of the credibility to be given their testimony. You may take into consideration all the facts and

circumstances in determining what weight you shall give their testimony and you are the sole judges thereof.

These instructions plainly informed the jury that Ford and Matusow had been paid for their information and that the jury might consider this circumstance in determining the weight to be accorded their testimony. It is to be noted that each of these witnesses had been subjected to searching cross-examination both on matters relating to the substance of their testimony and on issues of credibility (R. 303-326, 360-384 (Ford); R. 602-658, 668-693 (Matusow)), and counsel for petitioner most emphatically had urged that their testimony was not to be relied on because of their character as informers (R. 1169-1171, 1174-1179). Under the circumstances, there can be no doubt but that the jury was sufficiently instructed.

This case does not fall within the rule of *Fletcher* v. *United States*, 158 F. 2d 321 (C.A. D.C.), relied on by petitioner (Pet. 42). In that case the court reversed a narcotics conviction where the *sole* witness produced by the prosecution was a paid addict-informant, and the trial court had refused a precautionary instruction. Cf. *Gordon* v. *United States*, 344 U.S. 414, 417. Here, by contrast, six witnesses in addition to the two to whom this objection is addressed gave mutually corroborative testimony as to activities of petitioner tending to show membership or affiliation with the Communist Party. Cf. *Cratty* v. *United States*, 163 F. 2d 844, 850 (C.A. D.C.).

3. *Admissibility of petitioner's 1949 non-Communist affidavit.*

Petitioner contends (Pet. 37-40) that the trial court erred in admitting into evidence the non-communist affidavit signed and filed by petitioner in 1949, because it tended to show the commission of an offense not charged in the indictment.

Evidence otherwise competent and relevant is not rendered inadmissible because it tends to show the commission of another offense. *Moore* v. *United States*, 150 U.S. 57, 61. Reception of such evidence is within the sound discretion of the trial court and may be admitted to prove motive, intent, absence of mistake or inadvertence, common scheme, or plan. *Weiss* v. *United States*, 122 F. 2d 675, 682-683 (C.A. 5), certiorari denied, 314 U.S. 687; *United States* v. *Tuffanelli*, 131 F. 2d 890, 893 (C.A. 7), certiorari denied, 318 U.S. 772; *Bracey* v. *United States*, 142 F. 2d 85, 87-88 (C.A. D.C.), certiorari denied, 322 U.S. 762; *United States* v. *Eisler*, 75 F. Supp. 640, 643 (D. D.C.), affirmed, 176 F. 2d 21, certiorari denied, 337 U.S. 958 (prior false statement concerning membership in Communist Party held admissible).[16]

As the court below held (Pet. App. 88-92), the facts of this case make it a typical one for the application of this doctrine. The proof showed that petitioner and his union had initially followed the

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[16] The cases cited by petitioner (Pet. 38, 39) are not in conflict with the cases cited above, but rather are examples of the application of the general rule to the particular facts of those cases.

policy of refusing to file non-Communist affidavits (R. 572). But this policy was abandoned in 1949 in order to obtain the benefits of the National Labor Relations Act (R. 968), and the facilities of the Board were thereafter utilized by petitioner in prosecuting an unfair-labor-practice charge against an employer (R. 97-99; R. 1000, G. Ex. 13). Upon filing the 1949 affidavit, petitioner published in the union newspaper a statement signed by himself as president of the union, which, after referring to the raids which his union had suffered during the period it was not in compliance, stated that (G. Ex. 24, R. 968-969):

> Now that our Union has signed the phony affidavits we can defend ourselves on a ballot in case of raids.

A handwriting expert testified that the same person who had signed the 1949 affidavit signed the 1950 affidavit. The 1949 affidavit was necessary to make the above reference to "phony affidavits" intelligible, and together the affidavit and the statement showed an abandonment by petitioner of the policy of non-compliance, and the reasons for that abandonment; it further tended to identify petitioner as the signer of the 1950 affidavit and, in conjunction with the 1950 affidavit, to show a continuing scheme or plan on the part of petitioner to bring his union into compliance with the Act for the purposes of obtaining its benefits. The document was relevant and material to the issue being tried and was admissible.

Petitioner's further contention (Pet. 38) that the

jury might have been misled by the absence of specific instructions concerning the probative use of the 1949 affidavit lacks force when it is considered that the trial court reiterated five times in the course of its charge (R. 1058, 1061, 1062, 1063, 1064) that the issue for the jury's determination was whether or not the appellant was a member of or affiliated with the Communist Party on April 28, 1950.

4. *Exclusion of women from the jury.*

Petitioner contends (Pet. 43-47) that the exclusion of women from the jury pursuant to Texas law was contrary to the requirements of the governing federal statute, and (Pet. 47) that because of such exclusion he was deprived of rights guaranteed by the Fifth and Sixth Amendments.

The statutory basis for the exclusion of women from federal juries sitting in Texas was plain at the time this case was tried. Congress has provided that jurors in federal courts shall have the same qualifications as those of the courts of the state in which the federal court is sitting. Thus, 28 U. S. C. 1861(4), *infra*, p. 37, removes from the class of competent jurors anyone who "is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held." [17] Women

[17] Petitioner relies on the fact that the Judicial Conference had urged that women be qualified for federal service "irrespective of state laws" (Pet. 45-46). But, significantly, Congress did not accept this recommendation of the Judicial Conference. The bills which incorporated the recommendations of the Judicial Conference and which would have ac-

were not competent to serve as jurors in Texas. The applicable Texas statute governing the selection of jurors in Texas limited the jury list to men. Art. 2133, *Vernon's Annotated Civil Statutes of Texas, infra*, p. 37.

Nor does application of the plain mandate of the federal statute infringe any constitutional rights of petitioner. There is no constitutional rule or policy requiring women to be placed on jury lists. See *Glasser* v. *United States*, 315 U.S. 60, 65; *Ballard* v. *United States*, 329 U. S. 187, 199, 204 (dissenting opinions). The basis for the decision in *Ballard* holding that the all-male jury therein was illegally constituted was "the purposeful and systematic exclusion of women from the panel" in a state [California] which specifically made women eligible for jury service. It was this "departure from the statutory scheme" which was condemned. 329 U. S. at pp. 193, 195. Admittedly (Pet. 44), no such departure from the statutory scheme of Texas is here involved.

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complished that result (H. R. 3379, 79th Cong., 1st Sess.; S. 18, 80th Cong., 1st Sess.; cf. draft bill, Judicial Conference of Senior Circuit Judges, 1942, *Report of the Committee on Selection of Jurors*, p. 44; Judicial Conference of Senior Circuit Judges, 1943, *Supplemental Report of the Committee on Selection of Jurors*, following p. 3), were amended prior to passage. As the House Report explains: "The last paragraph [par. 4] is added to exclude jurors incompetent to serve as jurors in state Courts" (H. Rep. 308, 80th Cong., 1st Sess., p. A156). The congressional understanding is further indicated by the fact that several bills have subsequently been introduced to provide for the qualification of women to serve on federal juries notwithstanding state law to the contrary. *E.g.*, H. R. 2051, 81st Cong., 1st Sess.; S. 2699, 84th Cong., 1st Sess.

The validity of state statutes excluding women from jury service has recently been considered and upheld as not inconsistent with federal rights by the courts of appeals of three circuits. *Quinones* v. *United States*, 161 F. 2d 79, 82-83 (C. A. 1), certiorari denied, 331 U. S. 833; *Johnson* v. *Sanford*, 167 F. 2d 738 (C. A. 5), certiorari denied, 334 U. S. 861; *Hanratty* v. *United States*, 218 F. 2d 358, 359-360 (C. A. 5), certiorari denied, 349 U. S. 928; *Martin* v. *United States*, 166 F. 2d 76, 77-78 (C. A. 4). So far as we know, no courts have been of a contrary view.

Moreover, insofar as Texas is concerned, the issue is moot. The laws of Texas have been amended so as to qualify women for service on juries. Act of May 20, 1955, Ch. 288, General and Special Laws of Texas (1955).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

The pertinent provisions of the statutes involved are:

18 U.S.C. 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 9(h) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 146, 29 U.S.C. 159(h):

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, * * * and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that

he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

28 U.S.C. 1861:

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

Vernon's Texas Civil Statutes, Art. 2133:

All men over 21 years of age are competent jurors, unless disqualified under some provision of this chapter. No man shall be qualified to serve as a juror who does not possess the following qualifications: * * *

APPENDIX B

SUMMARY OF PROCEEDINGS ON PETITIONER'S MOTION FOR A NEW TRIAL

On January 28, 1955, while petitioner's appeal from his conviction was pending in the court of appeals, petitioner filed a motion for a new trial, on the ground of newly discovered evidence.

Attached to the motion for a new trial and forming the basis therefor was an affidavit by Harvey Matusow, executed in New York City on January 20, 1955. The affidavit recanted certain portions of the testimony which Matusow had given at petitioner's trial in January, 1954 (H. 7-12). Among other denials he said: "There was no basis for my stating that Clinton E. Jencks was a member of the Communist Party at the time I stated so in Court" (H. 10).[18] On direct examination (H. 26-56), Matu-

[18] At no time during his testimony at petitioner's trial did Matusow state that Jencks was a member of the Communist party.

Paragraph 3 of the affidavit stated: "The matters I testified to were either false or not entirely true, at the time I so testified" (H. 7). The affidavit then indicated in four separate sub-paragraphs those portions of Matusow's testimony which he termed false. Sub-paragraph A (H. 7-8) referred to the first discussion which Matusow had with petitioner (R. 589). The only statement attributed to petitioner therein denied was the statement: "It is a good idea. We can use more active Communists out here." (H. 7-8.) Sub-paragraph B (H. 8) of the affidavit referred to the second conversation between Matusow and petitioner (R. 590-592). This sub-paragraph denied only that part of Matusow's testimony which related to petitioner's discussion of a plot of Mexican Communist organizers to cut off production for the Korean War. Sub-paragraph C (H. 9) referred to a lecture given by petitioner (R. 592). It denied that petitioner requested guests at

sow elaborated on the denials contained in his affidavit.

Evidence adduced by the Government in opposition to petitioner's motion for a new trial may be summarized as follows:

On October 8, 1952, in Salt Lake City, Utah, Matusow testified under oath before a United States Senate Subcommittee in public session (H. 136-141). Matusow, facing Jencks, who was there as a witness under subpoena and who was also under oath (H. 141-144), repeated the substance of his conversation (R. 590-592) with petitioner at the San Cristobal Valley Ranch in 1950, concerning a Communist plan to call a strike to slow copper production and hinder the Korean War (H. 144). Petitioner was questioned as to this conversation and asked whether he wished to deny Matusow's testimony. On the advice of his counsel, he invoked the privilege of the Fifth Amendment on the ground that his answer might tend to incriminate him (H. 144-145).[19]

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the ranch to read Communist literature. In sub-paragraph D (H. 11-12) Matusow denied that petitioner had stated that the Association of Mexican Americans was a key organization as far as Communist activities in New Mexico were concerned (R. 598).

[19] At the close of the session of October 8, 1952, Graham Dolan, who was employed by the International Union of Mine, Mill and Smelter Workers and who helped to edit the Union newspaper, criticized petitioner for having told Matusow anything. Petitioner's reply was: "Well, after all, I was with him at the San Cristobal Valley Ranch. . . . We used to discuss many things. . . . He happened to ask me about the strike. Why the strike? What we intended to do about the strike? I

On April 20, 1953, before a grand jury in El Paso, Texas, and again on December 4, 1953, before the Texas Industrial Commission at Austin, Texas, Matusow described this same conversation (H. 583-592).

In the fall of 1953, Matusow prepared an outline for his book "Blacklisting Was My Business" (H. 201, 206). The outline (G. Ex. 7, H. 213-219) contained no reference to false testimony. During the period from the fall of 1953 to mid-July, 1954, Matusow unsuccessfully attempted to interest various persons and publishing houses to undertake publication of the book (H. 191-248). He testified that he told a number of these people that he had given false testimony under oath (H. 54, 640-642). One of these was Elmer Davis, the columnist (H. 54). Matusow retracted this claim on cross-examination (H. 166).[20] He also approached Bishop

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just handed him a line. After all, I had to tell him something. It's nothing to worry about with that phoney. All these hearings, they are not going to prove anything by it anyway." (H. 534.)

[20] To substantiate his recantation, Matusow claimed that a letter which he had written to Senator McCarthy on August 24, 1953, was a confession to the Senator that he had given false testimony (H. 63-65). Actually, the letter reaffirmed the honesty of his relations with the Government (G. Ex. 1, H. 59-61). Matusow likewise claimed that an affidavit (G. Ex. 4, H. 168-172) he gave to the New York Times was a retraction of some of his sworn testimony (H. 53). On cross-examination he admitted that the affidavit was actually a justification and explanation of his estimates concerning that newspaper and reaffirmed his belief that his estimates had been true (H. 168-175). He also claimed that in 1953 he had advised an F.B.I. agent that his testimony in the Jencks case was not honest. (H. 68). Agent Crandall, to whom Matusow had spoken, refuted this charge under oath (H. 754-755).

G. Bromley Oxnam. (H. 185-189). Subsequently when questioned about his conversation with Bishop Oxnam by the House Un-American Activities Committee in Washington, D. C., on July 12, 1954, Matusow denied ever saying that he had lied under oath (H. 178, 188).

In the summer of 1954, Nathan Witt, associate counsel for petitioner and general counsel for the International Mine-Mill Union, drafted a motion for a new trial for petitioner, and submitted his papers to E. B. Elfers, El Paso, associate counsel, and to John McTernan, trial counsel for petitioner (H. 776). It was determined that the motion was not based on sufficient information and it was abandoned (H. 776-777, 798). On September 13 or 14, 1954, Witt and McTernan conferred in New York City regarding the motion. They agreed that Matusow would be essential to the motion and decided that rather than approach him directly they should aid him in finding someone to publish his book (H. 798).

On or about September 21, 1954, Witt discussed the problem with John Clark, president (H. 434), Orville Larson and Ausbury Howard, vice presidents (H. 435), and Maurice Travis, secretary (H. 435), of the International Mine-Mill Union, at a meeting held at the Grand Hotel in Butte, Montana (H. 437, 438, 443-445). These officers authorized Witt to expend $1,000 to assist in the publication of Matusow's book (H. 445, 456-457, 778-780, G. Ex. 18). This method was used because they were afraid the Department of Justice would try to

find something wrong in their activities in attempting to get the "truth" from Matusow (H. 799).

Shortly after Witt's return to New York, he had a conference with petitioner and Albert E. Kahn (H. 774, 779). They agreed that Kahn's firm of Cameron and Kahn, Inc., would undertake to publish Matusow's book with money furnished by the Union through Witt (H. 779-780).[21] Witt advanced $200 to $250 to Kahn to defray the expense of locating Matusow (H. 780). Matusow was not aware of any of these arrangements and Kahn was instructed by Witt not to reveal Witt's connection until the appropriate time (H. 801).[22]

On October 22, 1954, Matusow told two Mormon missionaries that he had worked against the Communist Party at a dude ranch near Taos, New Mexico (H. 760-761). On the morning of October 23, although he had had no previous contact with Kahn (H. 320), Matusow attempted to place a long distance telephone call from Taos, New Mexico, to

[21] This is the same Albert E. Kahn who was accused of being a Communist Party member by Matusow in June, 1954 (H. 274).

[22] During this time Matusow was living in Dallas, Texas, and was reduced to selling programs in the lobby of the Melba Theatre (H. 281). While in Dallas he received a message from his parents in New York that a Mr. Cameron was trying to locate him (H. 298). In mid-October he left Dallas on a hiking trip to Salt Lake City. He intended to prospect for uranium with some friends (H. 302-303, 686). At this time his total financial resources were from $40 to $70 (H. 300). On approximately October 21, 1954, he arrived in Taos, New Mexico, where he traded his bicycle for a room (H. 321). He also borrowed $10 from Doughbelly Price (H. 327).

Kahn's residence, Croton-on-the-Hudson (H. 714, 725). He subsequently contacted Kahn at his office and arranged to be furnished air transportation to New York (H. 326). On the same day Matusow invited Riley Taintor to have dinner with him. During the dinner Matusow stated that he had received an advance of $1,000 from his publishers and displayed a large roll of bills (H. 736-737). Matusow denied receiving any money while in Taos (H. 686). The following day Matusow flew from Albuquerque, New Mexico, to New York City. While waiting for his plane in Albuquerque, Matusow remarked to the ticket agent that he was going to New York to write a book, and he commented: "No, they are not interested in the truth but as long as they will pay money for it I will write anything" (H. 546-547).

Matusow met Kahn and Cameron in New York City on October 25, 1954, to discuss publication of his book (H. 378). A contract (G. Ex's. 15 & 16, H. 383-395) for the writing and publication of the book was entered into between Matusow and the firm of Cameron and Kahn the next day (H. 395, 427). It was agreed that Matusow would receive an advance payment of $1500 (H. 390).

The subject matter of the book Matusow had planned to write was dictated into a recording machine (H. 404). Kahn was present and occasionally asked questions to develop the story more fully (H. 404-405). In the course of this procedure Matusow stated to Kahn:

> I knew Jencks was a party member and I said so. I can't say here that Jencks wasn't a Party member after he signed the affidavits because I know that he was . . . [G. Ex. 28; H. 693-694].[23]

During this time Kahn was in constant communication with Witt and kept him informed of the progress of the project. (H. 781). He delivered copies of the typed recordings to Witt at his office as they were completed (H. 781-782). When the recording was completed in mid-December, 1954, Matusow was formally introduced to Witt (H. 406, 783-784). Exactly what occurred between them is not fully covered by the evidence. However, the outcome was that Matusow agreed to make an affidavit on behalf of petitioner (H. 785-788).[24]

Shortly after his interview with Kahn, a chapter of the book concerning the Jencks trial was written (H. 784-787). Witt took the draft of this chapter to Denver on January 3, 1955 (H. 787), and it was discussed at a meeting of Mine-Mill officials (H. 793). Witt advised the union officials that he expected Matusow to make an affidavit on petitioner's behalf (H. 793). Thereupon he was instructed

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[23] This does not appear in the book as it was finally published (H. 694-700), although in the original draft Matusow again referred to Jencks as a Communist Party member (G. Ex. 23A; H. 682-683).

[24] Following this interview, Matusow was advised by Witt that it would be difficult for the Government to prosecute him for perjury on the basis of contradictory statements. Witt further suggested that the Government would not want to prosecute Matusow because it would affect other cases (H. 352-355).

to contact Kahn and arrange for a bodyguard to protect Matusow (H. 793-794).

Matusow wrote a draft of his proposed affidavit of recantation on January 17, 1955 (H. 790, 121-126). Witt had previously supplied Kahn with a copy of the record of the case (H. 781-782). The final form of the affidavit was executed on January 20, 1955 (H. 788, 813). The affidavit was filed in the District Court on January 28, 1955 (H. 2,4). No investigation was undertaken by the union with reference to the reliability of Matusow's recantation (H. 479, 487).[25]

The International Office of the Mine-Mill Union undertook to purchase 7,000 copies of Matusow's book at a cost of $3,250. This figure does not cover the number of copies which the local unions might undertake to purchase (H. 508). In addition the Canadian branch of the Union assured the publisher, Cameron and Kahn, Inc., that they would purchase 5,000 copies (H. 508-509).[26]

On direct examination at the hearing, Matusow stated that he had never told anyone that he had lied in the Jencks case before he met Albert E. Kahn, his publisher (H. 272-273).

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[25] On January 29, 1955, at a Mine-Mill Union Defense Fund Conference in El Paso, Orville Larson, a vice-president of the Union, urged a drive to discredit all Government witnesses in Communist cases (H. 804-805).

[26] The Union is the bargaining agent for the major non-ferrous metal mining companies in the United States and Canada as well as for a number of companies producing uranium ore (H. 471-472). The Union has approximately 80,000 members in the United States and approximately 32,000 in Canada (H. 471).

At the hearing no evidence was adduced by petitioner in support of the motion other than the testimony of Matusow. The Government produced ten witnesses and eighteen exhibits in opposition to the motion. Upon due consideration of all the evidence, the trial court denied the motion for a new trial on March 12, 1955 (H. 825-826).

On appeal, the court of appeals affirmed (Pet. App. 49-67), holding that the evidence supported the trial court's finding that Matusow testified truthfully at the trial, and that his recantation was false (Pet. App. 61), and that in any event "upon the whole record, it is manifest that the testimony without Matusow was so convincing that it is difficult to justify the thought that any other result could have been reached if Matusow had not been present as a witness" (Pet. App. 63).

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